The Market Place, Inc., Alter Ego to The Market Place, Inc. and Joseph Cingrani, a Partnership d/b/a The Market Place, Inc. *and* United Food and Commercial Workers Union Local 546, Chartered by the United Food and Commercial Workers International Union, AFL–CIO, CLC. Case 13–CA–29557

September 16, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On April 10, 1991, Administrative Law Judge Robert A. Giannasi issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Cheryl Sternberg, Esq., for the General Counsel.
John P. Morrison, Esq., of Chicago, Illinois, for the Respondent.
Charles Orlove, Esq., of Chicago, Illinois, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT A. GIANNASI, Administrative Law Judge. This case was tried on December 10, 11, and 12, 1990, in Chicago, Illinois. The complaint alleges that Respondent, The Market Place, Inc., was and is the alter ego of, or in the alternative, the successor to a partnership between it and one Joseph Cingrani with respect to a bargaining obligation covering meat department employees at its supermarket. The complaint alleges that, as an alter ego, Respondent was obligated under a collective-bargaining agreement with the Charging Party (the Union), which renewed itself by its terms yearly in the absence of notice of termination, and, as a successor, was at least obligated to continue bargaining with the Union as the exclusive bargaining representative of all the meat department employees because it represented a majority of those employees. The complaint also alleges that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union as exclusive bargaining representative ''since on or about December 27, 1989,'' by thereafter withdrawing recognition from the Union on May 15, 1990, and by unlawfully polling its employees as to their union preferences on July 12, 1990. The complaint further alleges that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to apply and abide by the terms of a collective-bargaining agreement between the Union and the partnership since on or about December 27, 1989, by unilaterally changing working conditions since on or about July 1, 1990, and by issuing written warnings to employees in connection with these changed working conditions. The Respondent filed an answer contesting the essential allegations in the complaint. Briefs have been filed by the General Counsel and the Respondent which I have read and considered. Based on the briefs, the testimony of the witnesses, and my observation of their demeanor, as well as the documentary evidence, and the entire record, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, The Market Place, Inc. (Market Place) is a corporation which operates a retail grocery store or supermarket at 521 West Diversey Parkway in Chicago, Illinois. During a representative 12-month period, Respondent Market Place derived gross revenues in excess of $1 million and purchased and received, at its Chicago facility, products, goods, and materials valued in excess of $50,000 directly from points outside Illinois. Accordingly, I find, as Market Place admits, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

1. Background: the operation of the meat department

Market Place is the present name of the full-service retail supermarket owned and operated by the Stellas family for many years at the Diversey location in Chicago. The supermarket operated under the name Shop and Save until 1986. The president of Market Place is George Stellas Sr. His son, Peter Stellas, is the meat and produce manager. For many years the meat market or department of the supermarket at Shop and Save or Market Place was owned and operated by a separate entity, a partnership between the supermarket and Joe Cingrani. Cingrani had a one-third ownership interest and two-thirds was owned by Market Place or, before 1986, Shop and Save, in both cases, the corporate entity of the Stellas family. The partnership was also known and referred to as S & S Meat Market or S & S Meats. The parties signed and observed a partnership agreement formalizing their relationship.

At all times until the dissolution of the partnership on June 30, 1988, S & S Meats operated separately and at arms length from the corporate entity owned by the Stellas family which I will refer to as Market Place, even though for part of the time it was known as Shop and Save. S & S Meats sublet the meat department section of the supermarket from Market Place pursuant to a written lease. S & S Meats and Market Place maintained separate accounting books and records as well as bank accounts at separate banks with different authorized signatories. They maintained separate financial statements, filed separate income tax returns under different employer identification numbers and used different attorneys. S & S Meats owned and paid for its own equipment and meat products although sometimes Market Place intitially purchased the products for reasons of convenience; S & S Meats reimbursed Market Place for these initial purchases. S & S Meats also paid for its share of unemployment compensation and liability insurance policies which covered the employees of both entities. It paid the wages and salaries of its own employees who were represented separately, and in a separate unit, by the Union. The supermarket employees of Market Place—a much larger employee complement—were, until some time in 1988, represented by another union.

The management and supervision of S & S Meats and Market Place were separate and distinct. S & S Meats was run by Joe Cingrani. Market Place was run by the Stellas family. Cingrani made all employee relations decisions for S & S Meats. No one from Market Place had any authority or in fact exercised authority over these matters for S & S Meats. Cingrani had no such authority over the employee relations decisions of Market Place. The Union dealt only with Cingrani with respect to contracts or labor relations matters for S & S Meats. No one from Market Place supervised the employees of S & S Meats. Cingrani drew a salary from S & S Meats, but the Stellas family, notably George Stellas, did not receive a draw from the partnership.

On June 30, 1988, S & S Meats was dissolved and Market Place purchased Cingrani's interest in the partnership. Market Place thereafter wholly owned the meat department and operated it as part of its overall store through Peter Stellas. Cingrani retired and has no relationship with Market Place or the meat department. The partnership dissolution was memorialized by an agreement negotiated through separate attorneys.

When Market Place took over the meat department, it retained the entire work force except for Dean Ravers, a butcher.[1] Market Place immediately hired a new meat director with responsibilities over the meat department; he was the only new person hired for the meat department when Market Place took it over. Of the four employees retained—Joe Downing, Emery Edenhofer, Betty Conner, and Hiroshi Kuwashima (Hiro)—three, all but Hiro, were members of the Union. Thus, it is clear that, as of July 1, 1988, the employees of Market Place's meat department included a majority of the S & S employees in an appropriate unit.[2] It is also clear that a majority of the meat department's employees at the time of the takeover were union members. The Union thus represented a majority of the employees in the unit at the time of the takeover. I do not include in this total Meat Director Greg Kane or his successor, DeWayne Spielman, who were supervisors.[3]

After the takeover, Market Place serviced the same meat department customers at the same location as had S & S Meats. It also utilized essentially the same suppliers. It continued selling meat and fish as had S & S Meats under the ultimate authority of Peter Stellas and the day-to-day authority and supervision of Greg Kane and later DeWayne Spielman. Over time Market Place sought to upgrade the equipment of the meat department and changed its direction toward prepared foods and assisted rather than self service. Although the meat department was eventually given a ''new look,'' its basic operation and purpose did not change. And, although the employees were later required to wear uniforms like the rest of the store employees and to service customers to a greater degree than before, their basic jobs did not change.

2. The bargaining relationships of the parties

As stated above, S & S Meats had a bargaining relationship with the Union. The record contains several agreements purportedly covering the employees of S & S Meats, some signed by Joe Cingrani and officials of the Union. The latest of these was a master agreement in printed booklet form entitled 1985–1988 Independent Retail Meat Cutters Contract; it was executed on September 9, 1986. The circumstances of its execution are as follows. Union Business Agent Richard LeMonier serviced the S & S Meats facility, collecting union dues and handling any problems the employees might have on behalf of the Union. He visited the facility about once every 3 months. Despite LeMonier's jurisdiction over S & S Meats, Union Business Agents Harold Haas and George Spears, who had no direct responsibility for this unit, visited Joe Cingrani at the facility on September 9, 1986, to obtain his signature on the master agreement. Haas apparently knew

[1] The parties stipulated that there were only five bargaining unit employees prior to the takeover. This does not include part-owner and Manager Joe Cingrani who, of course, retired on June 30, 1988. Four of the five employees, all except Ravers, were retained by Market Place.

[2] The parties stipulated that the following was and is an appropriate unit within the meaning of Sec. 9(b) of the Act:

> All employees in the meat department who process, pack, wrap, handle, price, and sell frozen and fresh meats on Respondent's premises.

[3] The parties litigated the supervisory status of Spielman, the incumbent head of the meat department at the time of the withdrawal of recognition. Peter Stellas and several employees testified about Spielman's duties. Significantly, Spielman, who was still employed at the time of the hearing, was not called by the Respondent as a witness. However, the testimony in the record establishes that Spielman has significant supervisory authority within the meaning of Sec. 2(11) of the Act.

Spielman runs the meat department on a day-to-day basis. He schedules meat department employees and assigns them their work. He grants them time off, authorizes overtimen and handles employee problems. Peter Stellas, who carries the title of meat and produce manager and has ultimate authority over the meat department, is not in the department ''very often,'' according to an employee witness. Another employee testified that Spielman hired him. Unlike the rest of the meat department employees, Spielman does not punch a time clock and is not paid time-and-one-half for working overtime. With the possible exception of employee Vito Proce, who may also have served as assistant manager after he was hired in February 1989, Spielman was the only person in the meat department who was salaried. Spielman alone among meat department personnel attended periodic management meetings called by the Stellases. In addition, he has been provided by Respondent with business cards and has attended trade shows on behalf of Respondent. To the extent that Peter Stellas's testimony on this issue conflicts with that of employee witnesses, I reject it as self-serving and not as candid and forthright as that of the employees who dealt with Spielman every day. Accordingly, I find that Spielman is a statutory supervisor and, as such, is excluded from the unit. See *Liberty Markets*, 236 NLRB 1486, 1495 (1978); *Butera Finer Foods*, 296 NLRB 950, 954 (1989).

Cingrani from past dealings. Haas and Spears testified that they observed Cingrani sign the 1985–1988 contract in their presence. They took one copy of the executed contract back to the Union's office and Cingrani retained one copy. Cingrani did not testify in this proceeding.

The record also contains two letters from LeMonier to George Stellas in April and May 1987, stating that the Union had been unsuccessful in getting the ''current agreement'' signed. This was a reference to the S & S Meats employees even though the letters were addressed to Stellas as a principal of ''The Marketplace.'' Shortly after the receipt of these letters to Stellas, Respondent's attorney, Matthew Phillips, wrote a letter to the Union requesting a copy of the current agreement. Union President Fred Clavio responded and enclosed a blank copy of the 1982–1985 agreement which he said was due to expire on July 20, 1987. LeMonier later called Phillips at Clavio's request. Phillips told LeMonier that he wanted to see a signed copy of an agreement covering the meat department employees. LeMonier said that he was ''a bit embarassed, but that there was no executed contract.''

Here I must digress. The above raises a credibility issue about the existence of an executed agreement as of September 1986, less than a year before LeMonier's representation that there was no such agreement. Respondent vigorously contests the existence of such an agreement. I must say that LeMonier's 1987 attempt to get an agreement signed is hard to reconcile with the testimony by other union officials that one was signed, placed in the Union's files, and uncovered much later, indeed, after the withdrawal of recognition, and presented to the Respondent at that point. Respondent's position would require me to find that the 1985–1988 agreement was a fraud. I cannot make such a finding. I prefer to view the evidence as a bumbling example of a representative effort by an organization which had no real involvement in the meat department and could care less until something dramatic happened. I am unprepared to discredit the essentially mutually corroborative testimony of Spears and Haas, particularly in view of the failure of anyone to call Cingrani as a witness, thus rendering the testimony uncontradicted. I view as pathetic but plausible that LeMonier did not know or remember that an executed contract had been secured covering a facility within his jurisdiction by two colleagues. For some reason—and this was before the takeover of the meat department by Market Place—LeMonier sought out Stellas, with whom he had never dealt, rather than Joe Cingrani, with whom he always dealt, in order to obtain a signed contract. This was done when one apparently already existed deep in the Union's archives. In any event, and ironically, this finding, as difficult as it is to make on a hotly contested issue, is not crucial to the case. Whatever presumption of majority the General Counsel sought to secure by virtue of the executed 1985–1988 contract was established by virtue of the evidence of actual majority as of the date of the takeover based on union membership. And, insofar as the General Counsel seeks to have the contract applied to Market Place, the validity of the 1985–1988 contract has little significance in view of my findings with respect to alter ego and the failure of Market Place to adopt the contract. These findings are discussed in greater detail later in the analysis section of this decision.

Returning to the story, apart from whatever agreement existed between the parties, S & S Meats made health and welfare and pension payments for only three—or at most four—of its five rank-and-file employees.[4] It did not make these payments on behalf of Hiro even though the 1985–1988 agreement referred to above clearly covered employees like him who worked primarily with fish. Nor did the Union collect dues from Hiro or require him to be a union member. The other employees were members and had their dues payments collected in person periodically by LeMonier upon his quarterly visits to the facility. The 1985–1988 agreement required fringe benefit payments for all covered employees and required union membership after 30 days.

Prior to some point in 1988, the nonmeat department employees in the grocery sections of the supermarket—those employed by Market Place—were represented by another union. In 1988 (the date does not appear in the record), these grocery employees of Market Place voted to decertify their bargaining representative. Thereafter they participated in Market Place's profit sharing plan and its hospitalization and health insurance plan.

After Market Place took over the meat department, it continued to pay the union health and welfare and pension contributions on behalf of the three acknowledged members of the Union. But it did not make such payments on behalf of the nonmembers in the meat department. There is no evidence that, in making the union fringe benefit contributions, Market Place followed any particular bargaining agreement; it simply paid whatever amounts the union fringe benefit funds said it owed. Hiro, who had a Keogh retirement plan prior to the takeover, rolled this plan over into Market Place's profit-sharing plan. Presumably, Hiro also participated in Market Place's hospitalization and health insurance plan.

When Market Place hired new meat department employees it treated them as nonunion employees and did not make union health and welfare or pension contributions on their behalf. It carried them under the profit sharing and hospitalization and health insurance plan utilized for the rest of its employees.

Market Place hired two new rank-and-file meat department employees after the takeover. The first was Vito Proce, hired in February 1989, and the second was John Maggio, hired in February 1990. Both had formerly been members of the Union when they worked for other employers, but insisted, when they were hired by Market Place, that they wanted nothing to do with the Union or a union shop. They declined to become union members and had no union health and welfare or pension contributions paid on their behalf.

Shortly after the Market Place takeover of the meat department, in July or August 1988, Union Business Agents LeMonier and Spears went to the supermarket and met with Peter Stellas. They asked Stellas to sign a union contract. Although there was some general discussion about a contract, Stellas agreed only to continue to pay the health and welfare and pension contributions in the same manner as S & S Meats. The union business agents left a blank copy of the preprinted 1985–1988 industrywide master agreement with Stellas. At no time between this meeting and May 15, 1990,

[4] The record is silent as to whether employee Ravers was a union member or whether he had union fringe benefit contributions paid on his behalf.

when Respondent withdrew recognition, did the Union ever follow up and ask that Respondent sign a contract or bargain with it. Indeed, between August 1988 and his retirement in late 1989, LeMonier did not even speak to Peter Stellas, except for small talk, even though he continued visiting the meat department about every 3 months to talk to employees and collect union dues. He did not file grievances, either written or oral, on behalf of the employees because, as he testified, there were none. There is no doubt, and I specifically find, that he knew Hiro and Proce worked in the meat department and that he also knew they were not union members.[5]

After LeMonier's retirement in late 1989, Union Business Agent James Walsh was assigned to service the Market Place meat department. Walsh continued making periodic visits to the meat department much as LeMonier had done before his retirement. Like LeMonier, Walsh knew who was and who was not a union member; actually, he tried unsuccessfully to sign up those employees who were not members, particularly Maggio who was hired during Walsh's tenure. Walsh also spoke to Peter Stellas on several occasions in the first few months he was assigned to the facility, but, according to his own testimony, their conversations were brief and uneventful.

In the spring of 1990, Walsh started dealing with Stellas over the discharge of employee Joe Downing, a union member. In the course of their discussions over the Downing discharge, Stellas and Walsh also discussed generally the existence of a contract covering the meat department employees. Apparently in response to Stellas's query, Walsh said he did not know if such a contract existed. He did tell Stellas that it was ''crazy'' for some of the meat department employees to be in the Union and others not. Walsh said, again according to his own testimony, that ''we should have all or none.'' At this point, however, Walsh was not concerned about contractual issues, but rather with getting Downing his job back. Nevertheless, Walsh did provide Respondent with an addendum to a master agreement signed by Joe Cingrani on May 4, 1979, in apparent support of the Union's view that there was a contractual arrangement covering the meat department employees. At this point, Respondent's attorney, Matthew Phillips, became involved in the discussions and asked Walsh to provide a copy of the master agreement to which the addendum referred and a signed copy of that agreement. Walsh met with Phillips and another attorney for Respondent on April 26, 1990, in Phillips' office. Walsh provided the attorneys with a copy of the signed addendum as well as other blank master agreements, the latest of which expired in 1991. In this or another meeting at about the same time, Respondent's attorneys expressed the desire to ''sit down and talk about contracts,'' according to Walsh. But Walsh told them, again according to his own testimony, that he was ''not here to discuss anything contractual''; he wanted only to discuss the Downing grievance. The Downing matter was resolved shortly thereafter, in late April or early May 1990; Downing was reinstated with backpay.

[5] This is based not only on his periodic visits to the facility, but also imputed knowledge from the absence of union fringe benefit contributions on behalf of Hiro and Proce.

3. The withdrawal of recognition and its aftermath

On May 15, 1990, the Respondent withdrew recognition from the Union in a letter to the Union written by Phillips. The letter stated that Respondent did not believe that there was a valid agreement in existence between it and the Union, and, in the alternative, Respondent had a ''good faith doubt of majority status of the union.''

On May 30, 1990, the Union's counsel responded to the May 15 letter stating, inter alia, that the earlier agreement provided to the Respondent had ''been renewed yearly following its scheduled termination and by the employer's general compliance with its various updated terms and conditions.'' He also pointed out what he asserted were contractual violations and he requested bargaining to conclude a successor agreement.

On June 22, 1990, the Union filed an unfair labor practice charge alleging that Respondent had violated the Act by embarking on a ''program of harrassment [sic] and intimidation in order to undermine the Union's position . . . and erode the Union's majority status'' by terminating employee Downing, ''telling employees they could receive other and better benefits if they abandoned the Union,'' engaging in individual bargaining and withdrawing recognition.

On July 1, 1990, Respondent issued warnings to employees Joe Downing and Emery Edenhofer for refusing to work on a Sunday which they were scheduled to work. The assignment of these employees to perform Sunday work was allegedly contrary to the existing master agreement and a change in existing conditions of employment. This was done without advance notice to the Union.

On or about July 12, 1990, Respondent's attorney spoke to some employees in response to the Union's unfair labor practice charge. The General Counsel alleges that this was a poll of employees and was undertaken without prior notice to the Union and in the absence of a good-faith doubt of the Union's majority status.

On July 16, 1990, the Union's counsel wrote another letter to Respondent informing it of the recent discovery by the Union of a copy of the 1985–1988 master agreement signed by Cingrani on September 9, 1986. Enclosed was a copy of this agreement.

On August 22, 1990, the Regional Director for Region 13 wrote a letter to the Union's attorney notifying him that she was dismissing part of the charge filed by the Union. She stated that her investigation found the evidence ''insufficient to show that the Employer engaged in a pattern of harassment and intimidation of its employees in an effort to undermine the union's majority status or that the Employer engaged in individual bargaining with its employees.'' She also found that, contrary to the charge, certain statements allegedly made to employee Downing were ''vague'' and unrelated to union activities and that the evidence ''was insufficient to show that his discharge was because he engaged in union or protected concerted activities.'' She continued, ''[a]ssuming arguendo that he was, the evidence shows that he was reinstated and made whole without loss of seniority. Therefore, in these circumstances, it would not effectuate the Act to issue complaint herein.'' The Union did not appeal this dismissal to the General Counsel in Washington.

On August 31, 1990, the Regional Director, on behalf of the General Counsel, issued the complaint in this case.

B. *Discussion and Analysis*

The General Counsel's first theory of violation is that S & S Meats had an existing contractual relationship with the Union which bound Market Place when it took over the meat department because Market Place was the alter ego of S & S Meats. I find that the General Counsel has failed to prove an alter ego relationship. Alternatively, the General Counsel contends that when Market Place took over the meat department it was the legal successor to S & S Meats. There appear to be two branches to this contention: first, that Market Place affirmatively adopted the existing contract, and, secondly, assuming no adoption, that there was a bargaining obligation which flowed from the successorship itself. I find no adoption of a contract, but I do find that there was an obligation to bargain at the time of the takeover because Market Place was the legal successor to S & S Meats and the Union perfected the obligation by making a bargaining request. Because I find no alter ego and no contract adoption I shall dismiss the complaint allegation relating to the failure to apply the terms of a collective-bargaining agreement. Contrary to the General Counsel's contention, I am unable to find any evidence on this record that Respondent refused to bargain with the Union from December 27, 1989, until May 15, 1990, when Respondent withdrew recognition from the Union. Finally, I find, again contrary to the General Counsel's contention, that Respondent did have a good-faith doubt of the Union's majority status on May 15, 1990, when it withdrew recognition. This finding results in the dismissal of the remaining allegations in the complaint.

1. The bargaining relationship allegations

In order to prove alter ego, the General Counsel must show that Market Place is a ''disguised continuance'' of S & S Meats. Such cases ''involve a mere technical change in the structure or identity of the employing entity, frequently to avoid the effect of the labor laws, without any substantial change in its ownership or management.'' *Howard Johnson Co. v. Detroit Joint Board*, 417 U.S. 249, 259 fn. 5 (1974). Some of the factors which support an alter ego finding are essentially the same as those which would support a single employer finding: substantially identical management, business purpose, operation, equipment, customers, supervision, including common or centralized control of labor relations, and ownership. In addition, although apparently not essential to an alter ego finding, a significant factor is whether there was unlawful motivation in the creation of the new entity or in the transfer of ownership or operation. See *Hiysota Fuel Co.*, 280 NLRB 763 fn. 2 (1986); *Mar-Kay Cartage*, 277 NLRB 1335, 1340 (1985).

On this record the General Counsel has failed to prove that Market Place is the alter ego of S & S Meats. Prior to Market Place's complete takeover of the meat department, it had a two-thirds interest in S & S Meats, but none of its officials or managers had anything to do with the operation of S & S Meats or, more significantly, its labor relations. Joe Cingrani alone ran the meat department and supervised its employees. He dealt with the Union and signed any contracts between S & S Meats and the Union. S & S Meats and Market Place had separate financial statements and treated themselves as separate entities. There was no interchange of employees and each entity had its own bank account, banks, and attorneys. Once Market Place purchased Cingrani's interest in the partnership, he no longer had any interest in the meat department and the Stellas family began operating the meat department as an arm of its general supermarket business. Thus, there was a substantial change, after the takeover, in the ownership and management of the meat department. More specifically, there was a substantial change in the labor relations spokesman for the employing entity. After the takeover the Union dealt with Peter Stellas who had nothing to do with S & S Meats. Finally, and of crucial importance here, there is no evidence that the buyout of Cingrani had anything to do with avoiding union representation. The purpose of the buyout was to make arrangements upon Cingrani's retirement. Moreover, despite the Union's rather passive involvement in representing the employees both before and after the takeover, Market Place took pains to continue paying union benefits as had S & S Meats. It agreed to continue paying contributions to the Union's health and welfare and pension plans on behalf of union members. It continued to permit union business agents to enter the meat department to talk to employees and to collect union dues. And, despite some confusion as to the existence of any agreement between S & S Meats and the Union, Market Place did not actually withdraw recognition from the Union until almost 2 years after the takeover of the meat department. There was thus no unlawful motivation in the takeover. In these circumstances, I find that the General Counsel has not proved by a preponderance of the evidence that Market Place is the alter ego of S & S Meats.

Alternatively, the General Counsel asserts that Market Place is the successor of S & S Meats with respect to the meat department. Under the Board's successorship doctrine, an employer who takes over the operations of another employer also takes over the predecessor's bargaining obligation if the predecessor's employees are represented by a union, and ''the new employer makes a conscious decision to maintain generally the same business and to hire a majority of its employees from the predecessor.'' *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27, 41 (1987). The Board looks to ''substantial continuity'' between the old and the new employer, with particular emphasis on the employees' perspective. See *Williams Enterprises*, 301 NLRB 167 fn. 1, 170–171 (1991).

The General Counsel has proved successorship in this case. When Market Place took over the meat department on June 30, 1988, it continued operating the meat department essentially as it had been run before the takeover, with the exception of new supervision. The same products were worked on and sold, the same customers were serviced and the meat department employees performed the same work in the same jobs as they had the day before the takeover in the same location and with the same equipment. The employees also worked under essentially the same conditions. The fact that Peter Stellas and a new supervisor called the shots after the takeover did not appreciably alter the way the meat department employees performed their work; there was certainly no appreciable change from their perspective which would bear on union representation. Any changes in the meat department—they were implemented over time, not immediately—did not change the essential nature of the meat department as an employing entity or, more importantly, the jobs of the employees.

The most important factor in support of a successorship finding is whether a majority of the employees hired by the new employer had been employed by the predecessor. This was so in this case. The parties stipulated that the meat department was an appropriate unit. In that unit Market Place hired four of the five rank-and-file S & S Meats employees; three of them were members of the Union. It hired no new employees immediately, only a new supervisor who in effect replaced Joe Cingrani. Thus, at the time of the takeover, 80 percent of the employee complement of the predecessor made up the entire employee complement of the successor; and the Union's majority in the predecessor carried over to the successor. I cannot imagine a stronger case of ''substantial continuity.'' In these circumstances, I find that Market Place was and is the successor employer to S & S Meats, and that, as of July 1, 1988, when it took over the meat department, Market Place was obligated to bargain with the Union which represented a clear majority of the employees both before and after the takeover. See *Butera Finer Foods*, supra.[6]

The finding of successorship does not end the inquiry on this issue. The General Counsel asserts that the 1985–1988 contract signed by Cingrani on behalf of S & S Meats continued to apply even after the takeover. However, a successor is not automatically obligated under the contract of a predecessor. See *NLRB v. Burns Security Services*, 406 U.S. 272, 291 (1972). The General Counsel must affirmatively show that the successor adopted the contract of the predecessor. See *White-Westinghouse Corp.*, 229 NLRB 667, 669, 672 (1977), enfd. 604 F.2d 689 (D.C. Cir. 1979). Indeed, even the bargaining obligation of the predecessor does not attach to the successor unless and until the union perfects or triggers it by making a bargaining demand on the successor. See *Royal Midtown Chrysler Plymouth*, 296 NLRB 1039, 1040 (1989).

In this case, the General Counsel has failed to prove that Market Place adopted the S & S Meats or any other Union contract, but has proved that the Union perfected Market Place's bargaining obligation by virtue of a bargaining demand made after the takeover.

I find that the evidence shows that the Union made a bargaining demand on Market Place when its representatives met with Peter Stellas in July or August 1988. At that time the union representatives presented Stellas with a blank copy of a master agreement and left it with him. It is clear from the testimony of all witnesses to this meeting that the Union wanted Stellas to sign the master agreement on behalf of Market Place. A request to sign a particular contract is obviously a request to bargain. This satisfies the requirement that the Union make a demand for recognition or bargaining in order to perfect the successorship bargaining obligation.

On the other hand, Stellas's failure to sign the profferred contract highlights the finding, which I make, that Market Place did not adopt the 1985–1988 contract or any other union contract. Indeed, the Union failed to follow up its request for a signed contract. It was satisfied with the payment by Respondent of fringe benefit contributions on behalf of union members. But it did not seek to impose on Market Place or, indeed, enforce any other provisions of the master agreement or any other agreement with respect to the meat department employees. It permitted nonmembers to remain employed despite a union-security provision in the master agreement and it permitted Market Place to refrain from making fringe benefit contributions on behalf of nonunion employees. There is absolutely no evidence that Respondent intended to adopt or actually adopted any collective-bargaining agreement with respect to the meat department employees. Its payment of fringe benefit contributions on behalf of union members is not sufficient to establish adoption of the predecessor's contract. See *New England Mechanical v. Laborers Local Union 294*, 909 F.2d 1339, 1343–1344 (9th Cir. 1990).

In view of the findings I have made above that there was no contractual relationship between Market Place and the Union after July 1, 1988, I must dismiss the allegation in the complaint relating to such a contractual relationship, that is, paragraph VIII(a). I must also dismiss paragraph VII(a) of the complaint which alleges that Respondent failed and refused to bargain with the Union since on or about December 27, 1989, to the extent that this allegation is meant to cover the period prior to the withdrawal of recognition on May 15, 1990. The Union made no request to bargain after its representatives presented Peter Stellas with a copy of a proposed contract in July or August 1988. The failure or refusal to sign a proposed contract is not a refusal to bargain. Nor is there any evidence in the record of a particular refusal to bargain on the part of Market Place. As I have said before, the Union was perfectly satisfied with a continuation of the status quo, payment of fringe benefits on behalf of union members and an opportunity to visit the meat department to communicate with the employees and collect dues. In his brief, the General Counsel states that, after July 1, 1988, Respondent made changes in the terms and conditions of employment of the meat department employees without prior notification to the Union (Br. 29). However, there was no allegation in the complaint about specific unilateral changes during this period of time and the record contains no evidence of specific changes to which the Union objected. Indeed, the Union can be viewed as having waived any such objections by knowingly permitting Market Place to operate unilaterally during the period from July 1, 1988, to May 15, 1990. See *Citizens National Bank of Wilmar*, 245 NLRB 389 (1979).

2. The withdrawal of recognition allegations

This brings me to the withdrawal of recognition on May 15, 1990. It is, of course, well settled that an incumbent union carries certain presumptions of majority status from recognition, contractual relations, and certification. However, after the expiration of an agreement or at the end of the certification year, an employer may withdraw recognition from

[6] There was considerable argument over whether S & S Meats and the Union were operating under a collective-bargaining agreement at the time of the takeover. As I indicated earlier in this decision, I find that there was such a signed agreement. However, the Union's majority status at the time of the takeover does not depend solely on the existence of an agreement from which majority status is presumed. See *Barrington Plaza & Tragniew, Inc.*, 185 NLRB 962, 963 (1970), enf. denied 470 F.2d 669 (9th Cir. 1972). Here, the record shows, and no one disputes, that, after the takeover, three out of the four unit employees (excluding Kane who, like his successor, was a supervisor) were members of the union. Before the takeover, at least three of the five unit employees were members of the union. Although an absence of union membership does not mean that employees do not want the union to represent them, it is permissible to infer from the affirmative action of union membership that union members do desire union representation. Therefore, here, the Union did retain majority status even apart from the existence of a contract.

an incumbent union if it can prove that the incumbent has lost majority status or that it has a reasonable and good-faith doubt of the union's majority based on objective considerations. See *Robinson Bus Service*, 292 NLRB 70, 76 (1988).

On this record the Respondent has proved that it had a good-faith doubt of the Union's majority status at the time it withdrew recognition from the Union on May 15, 1990. For the purpose of this analysis, I shall assume that the employee complement in the meat department numbered six employees: Downing, Edenhofer, Conner, Proce, Hiro, and Maggio. Spielman was, as I have found, a supervisor and outside the unit.

Peter and George Stellas testified generally about conversations they had had with Hiro, Proce, and Maggio wherein these employees told them that they did not want to be ''in'' the Union or be union members. At least some, if not most, of these conversations took place before the withdrawal of recognition on May 15, 1990. None of these employees were ever union members while they were employed in the meat department even though they had been members of the Union for some time when they were employed elsewhere. Indeed, union representatives unsuccessfully sought to get them to join the Union while they worked at Market Place.

Employee Hiro had worked in the meat department since 1985. He worked for S & S Meats for 3 years before the takeover by Market Place. Under the contract which covered the meat department at this time, he was included in the unit described as extending to employees who worked with fish, as he did some 85 percent of the time. Indeed, the parties stipulated to his inclusion in the unit. However, Hiro opted against union membership and participation in the union fringe benefit plans. Neither the Union nor S & S Meats objected to this arrangement. The point here is that even though the S & S Meats contract required Hiro to become a union member and required fringe benefit payments to be made to union sponsored plans for all employees, these provisions were not enforced as to Hiro. Nothing changed in this respect after the takeover by Market Place. This arrangement, voluntarily chosen by Hiro and acquiesced in by the Union and the employer, supports the inference that Hiro did not want either union membership or representation. In addition, Hiro testified in this proceeding that he expressed to Peter or George Stellas ''in some forms [sic]'' that, as of May 15, 1990, he did not want the Union to represent him. He also testified that the Union has never represented him when he worked in the meat department.

The General Counsel points out that in his direct testimony—he was called as a rebuttal witness by the General Counsel—Hiro acknowledged that, in a pretrial affidavit given to a Board agent, he said, ''I have never told any management person that I do not wish to join the union. I never talk about the union with management, including DeWayne.'' When asked if this was true, he responded, ''[w]hen she [referring to the Board agent] said that—Yes, I didn't talk to nobody about that, yes.'' Earlier, Hiro had testified that he thought he did have a conversation with Peter or George Stellas about joining the Union. In showing Hiro his affidavit, counsel for General Counsel was attempting to impeach that testimony. Hiro had also testified on direct that he ''wasn't in the union to begin with.''

I am not sure that Hiro's testimony is inconsistent with his affidavit. He seemed to have a language problem, but it was clear to me that Hiro never believed he was ''in'' the Union. This is a broad description which in Hiro's mind no doubt encompassed union representation as well as union membership. His testimony on cross-examination confirms this. Even assuming some inconsistency on whether he mentioned these views to the Stellases, I believe that he did, both because he testified he did in his more detailed testimony on cross-examination and because it comports with their testimony that he did. Moreover, it comports with common sense. His feelings were so strong and so widely known that I find it plausible that he told the Stellases in some form about his desire not to be represented by the Union. They could certainly have inferred as much from the objective circumstances.

Employee Proce, who had been employed in the meat department since February 1989, was not a union member and did not have union fringe benefit payments made on his behalf. He testified that, shortly after the beginning of his employment, he told Peter Stellas that union representatives were ''bloodsuckers. They want everything and they don't do nothing for you. I don't want to have nothing to do with the union anymore after what they did to me.'' Proce was referring to the Union's failure to save his job when it represented him at a previous employer despite his seniority of 20 years. Stellas essentially confirmed this conversation; he testified that Proce had made it clear to him many times that he did ''not want to be represented by the Union and that he [would] never be in the Union again.'' There is no doubt that this view was expressed to management prior to the withdrawal of recognition and it could only be interpreted as a desire not to be represented by the Union.

Employee Maggio was hired in February 1990, and he too refrained from joining the Union and did not have union fringe benefit payments made on his behalf. Indeed, there is uncontradicted testimony that Union Representative Walsh repeatedly but unsuccessfully sought to have Maggio join the Union. Like Proce, Maggio testified that he had had problems with a previously unionized employer and was ''bitter'' at the Union for not resolving them. Like Hiro, Maggio was called as a rebuttal witness by counsel for the General Counsel. On direct she asked Maggio only whether had had any conversations with management officials about the Union or about joining the Union. He said he had not. On cross-examination, he testified he asked Peter Stellas whether there was a union at the facility. He also testified that he told his supervisor, DeWayne Spielman, that he did not want to join the Union, that he had mentioned this also to Peter Stellas prior to May 15, 1990, and that he made his position that he did not want the Union to represent him clear to one of the Stellases. Peter Stellas testified that when he was hired, Maggio told him that he did not want to work for another union shop.

It appeared to me that Maggio was more forthcoming and detailed on cross-examination than he was on direct. Here, as in the case of Hiro, I find more credible the employee's testimony on cross-examination than that on direct or the pretrial affidavit. Actually, Maggio's affidavit, which was admitted in evidence, confirmed much of his testimony on cross-examination. He did state in his affidavit that when he was hired he ''asked Peter [Stellas] or Vito [Proce] if there was a union and they told me it was up to me if I wanted

to join the union. I told them I did not want to join, but I did not tell them why.'' Whatever the differences between Maggio's testimony on cross-examination and that on direct or his pretrial affidavit, I do not think they justify rejecting his testimony altogether. On balance, I believe that his testimony was generally truthful, particularly that part of his testimony where he stated that he made clear to his employer his desire not to be represented by the Union. I make this finding based not only on his demeanor and the totality of his testimony, but also the testimony of Peter Stellas concerning his conversation with Maggio at the time of his hire.[7]

Based on my assessment of the evidence and my credibility determinations, I have concluded that three of the six employees in the meat department made clear to Respondent's management that they did not want the Union to represent them as of May 15, 1990, when Respondent withdrew recognition from the Union. Accordingly, this evidence provides a legally sufficient basis for Respondent's good-faith doubt, based on objective considerations, of the Union's continued majority status. See *AMBAC International*, 299 NLRB 505, 507 (1990).[8]

In addition to the antiunion views expressed to management officials by three of the six bargaining unit employees, Respondent's good-faith doubt of majority was also supported by its assessment of the Union's representative role in the meat department from July 1, 1988, when Market Place took it over, until May 15, 1990, the date of the withdrawal of recognition. The Union's representative role was minimal at best. Shortly after the takeover, the Union asked Respondent to sign a preprinted master agreement. It never followed up on that request or asked to bargain about wages, hours and terms and conditions of employment at least through the tenure of Business Agent LeMonier who retired in late December 1989. LeMonier simply collected dues from union members and tolerated the employment of nonunion members whose fringe benefits were different from those of union employees. Nor did Business Agent Walsh attempt to engage in any bargaining during his 5-month tenure until the withdrawal of recognition. He likewise collected dues and tolerated the half union half nonunion labor relations policy in effect in the meat department. He did deal with Respondent with respect to the discharge and reemployment of Union member Joe Downing. However, even though he spoke generally about a contract with representatives of Respondent, he refused to talk specifically about contractual issues prior to May 15, 1990. He did not even know whether there was a contract which covered the meat department. It is also unclear whether his predecessor LeMonier knew of the existence of such a contract. There was at least some doubt both on the part of the Respondent and the Union about the existence of a contract or indeed of an exclusive bargaining relationship covering all the meat department employees. Thus, it could be inferred that the Union tolerated a members only bargaining relationship. See *Ace-Doran Hauling & Rigging Co.*, 171 NLRB 645 (1968). At the very least, the Union's relative inactivity and mixed signals provided a basis for Respondent to conclude, in good faith, that the Union was not acting as an exclusive bargaining representative. This relative inactivity is another factor, taken together with the known antiunion views of half of the bargaining unit, which supports Respondent's withdrawal of recognition. See *Glosser Bros.*, 271 NLRB 710, 717–718 (1984).

In these circumstances, I find that Respondent did not violate Section 8(a)(5) and (1) of the Act when it withdrew recognition from the Union on May 15, 1990. It had a good-faith doubt, based on objective considerations, of the Union's continued majority status in the meat department.

One other point deserves discussion. The record in this case contains evidence with respect to the discharge and reinstatement of union member Joe Downing and also statements by Respondent's officials to employees that they could not belong to its admittedly attractive profit sharing plan if they were members of the Union. This evidence could be viewed as supporting findings that the discharge was unlawful or that statements about Downing's job future were coercive. The evidence also could be viewed as supporting findings that Respondent's repeated statements to employees about its restricted profit sharing plan constituted unlawful and discriminatory action. See *Melville Confections* v. NLRB, 327 F.2d 689, 691 (7th Cir. 1964), cert. denied 377 U.S. 933 (1964) (employer's position that union representation is a disqualification for eligibility in a profit sharing plan is per se unlawful under the Act). Compare *KEZI, Inc.*, 300 NLRB 594, 595–596 (1990). Such evidence, if shown to have supported findings of illegality, could, in turn, have been found to taint the withdrawal of recognition. For it is well settled that an employer may not withdraw recognition—whatever its objective evidence of union strength—in the context of its own unfair labor practices which may have caused the union defections it relies on. See *Process Supply*, 300 NLRB 756, 762 (1990).

The General Counsel seeks to rely, to some extent, on this evidence in alleging that Respondent's withdrawal of recognition was not made in good faith. For example, in a lengthy footnote to his brief, he states that the May 15, 1990 withdrawal of recognition ''did not occur in an atmosphere free of unfair labor practices'' (Br. 32). To the extent that this was meant to refer to an alleged unlawful refusal to bargain before May 15, 1990, I have, of course, rejected the underlying allegation and the argument thus has no validity. However, the footnote goes on to discuss other pieces of evidence, such as ''hiding'' new hires, informing meat department employees that the profit sharing program was not open to them, and attempting to get Downing to resign. This evi-

[7] The parties engaged in a posttrial skirmish over whether Maggio responded affirmatively to a question on cross-examination asking if he wanted the Union to be his bargaining representative as of May 15, 1990. The transcript does not reflect an answer to the question. Respondent moved to correct the transcript to reflect a ''no'' answer to the question and submitted an affidavit by Maggio in support thereof. The General Counsel filed an opposition to the motion. I have no independent recollection of whether an answer was given or what it was. I shall therefore let the transcript stand. I note that Maggio's subjective views at the hearing about union representation are not terribly relevant or reliable. What is important is what he told management about his views, which was the focus of counsel for Respondent's follow-up question. On this point, the record reflects that Maggio was asked if he made his ''position to Mr. Stellas clear that you didn't want the union to represent you'' and he responded, ''yes, I did.''

[8] There was considerable testimony about employee Betty Conner's continued adherence to the Union even though she remained a union member. In view of my disposition of this issue based on the expressed and known views of three other employees, I do not reach or resolve the issue of whether Respondent could rely on its assessment of Conner's desire for union representation. There is apparently no doubt that the two other employees, Downing and Edenhofer, retained their allegiance to the Union.

dence does not relate to any independently alleged illegality and cannot form the basis of unfair labor practice findings.

More importantly, most of this evidence—notably that concerning Downing and the failure to permit union members to join the profit-sharing plan—relates to portions of the unfair labor practice charge which were dismissed by the Regional Director, the General Counsel's agent in this regard. The General Counsel decided not to go to trial or complaint on these matters. He dismissed allegations that Respondent violated the Act with respect to Downing's discharge or statements that he resign, promised benefits to employees based on union considerations, or, indeed, that Respondent ''engaged in a pattern of harassment and intimidation of its employees in an effort to undermine the union's majority status.'' The General Counsel did not thereafter seek to amend the complaint to resuscitate these allegations as was done, for example, in *Sonicraft, Inc.*, 295 NLRB 766 (1989), enfd. 905 F.2d 146 (7th Cir. 1990), cert. denied 111 S.Ct. 671 (1991), a case arising out of this same Regional Office. Thus, in the litigation posture of this case, the evidence elicited by the General Counsel and mentioned in his brief as bearing on Respondent's good faith may not be used to argue that the withdrawal of recognition was tainted by misconduct. I am not permitted to make inferences of illegality based on such evidence. To do so at such a late stage of the proceedings, without appropriate notice to Respondent, would violate important due process rights.

In view of my findings concerning the Respondent's lawful withdrawal of recognition, I further find that there was no bargaining obligation on and after May 15, 1990. I shall therefore dismiss those portions of the complaint—paragraphs VII(b), (c), and (d) and VIII(b) and (c)—which allege bargaining violations on May 15, 1990, and thereafter.

CONCLUSION OF LAW

The General Counsel has not proved by a preponderance of the evidence that Respondent violated Section 8(a)(5) and (1) of the Act as alleged in this complaint.

On these findings of fact and conclusion of law and on the entire record, I issue the following recommended[9]

ORDER

The complaint is dismissed in its entirety.

[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.